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IN THE

Supreme Court of the United States

NO. 404

October Term, 1968

MAIR J. SCHEPPS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 7, 1968.

OPINIONS BELOW

The judgment of the District Court for the Southern District of Texas (R. 662) has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 672) has not been reported.

JURISDICTION

The judgment of Court of Appeals for the Fifth Circuit was made and entered on June 7, 1968 (R. 672). The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED

1. Whether evidence of the absence of a tax savings motive may be offered by the accused as being relevant to the issue of specific intent or willfulness in a defense to a prosecution under Sec. 7206 of Internal Revenue Code of 1954.

2. Whether the Attorneys for the United States denied Appellant a fair trial when they did nothing to controvert or qualify known false testimony from a government witness.

STATUTE INVOLVED

Internal Revenue Code of 1954:

Section 7206. Fraud and False Statements.

Any person who—

(1) *Declaration under penalties of perjury*—

Willfully makes and subscribes any return, statement or other document, which contains or is verified by written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * * shall be guilty of a felony * * * *. (26 U.S.C. Sec. 7206)

STATEMENT OF FACT

Appellant was the President and major stockholder of the House of Tobacco, a Texas Corporation, which had as its primary business purpose the sale at wholesale of cigarettes and candy (R. 79, 325-334; Gov. Ex. 1, 2).

Appellant was charged in two counts of an indictment with having willfully and knowingly made and subscribed as President the Federal Income Tax returns of the corporation for the fiscal years ending August 31, 1958, and 1959 (R. 727).[1]

The statute alleged to have been violated was Sec. 7206 of the Internal Revenue Code of 1954 [26 U.S.C. 7206 (1)] (R. 727).

The Federal Income Tax returns of the House of Tobacco, which were in question in the litigation, were prepared and signed by Solomon Bossin, the CPA employed by the Corporation (R. 329). These Federal Income Tax returns were also executed by the Appellant (R. 329).

In addition to Appellant, the corporation employed Messrs. Jack Rush and Dave Silberman. Messrs. Silberman and Rush made substantially all of the sales of the corporation and they together with Appellant maintained most of the records of the corporation (R. 256).

The corporation did not maintain a sophisticated accounting system, but rather employed a homemade system of checks and balances administered by Appellant, Mr.

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1. Appellant and eight other individuals were charged in count 1 of the same indictment with conspiring to defraud the United States. Appellant and one Jack J. Rush were charged in counts 2 and 3 of the same indictment with having attempted to evade the taxes of the House of Tobacco. Counts 1, 2 and 3 of the indictment were dismissed at the motion of the United States prior to the end of the case.

Silberman and Mr. Rush designed primarily to account daily for cash receipts. No attempt was made to actually account for daily sales (R. 263-265; 269-284).

The Federal Income Taxes due by the corporation were ascertained by Mr. Bossin at the close of the year by deducting from the bank deposits made by the corporation, known non-income items and adding thereto the accounts receivable and treating the balance as gross sales. Mr. Bossin would then take into consideration the purchases of the House of Tobacco and the accounts payable and other minor adjustments to finally compute the Income Tax due and payable by the House of Tobacco (R. 335-341).

The system utilized by Mr. Bossin was not primarily designed to compute the gross sales of the corporation, but rather to ascertain the Income Tax liability of the corporation. The system did accurately compute the Federal Income Taxes due by the House of Tobacco, but because of the failure of Mr. Bossin to take into consideration certain technical adjustments, the system would not accurately portray the gross sales figure (R. 373, 389, 390, 417).

Prior to the taxable years in question, all cigarette purchases were made by check and recorded in a purchase journal. During the years in question, cash purchases of cigarettes were made by the corporation from funds received in the ordinary course of business of the corporation, (both from non-income and income sources), prior to the time the funds had been deposited in the bank (R. 198-289).

These cash purchases of cigarettes had a downward distorting effect on the method of computing gross sales used by Mr. Bossin (R. 394).

Appellant was convicted on counts 4 and 5 of the indictment and prosecuted his appeal.

On appeal the Court of Appeals affirmed per curiam. The Court dealt only briefly with the issue of whether proof of an absence of a tax deficiency was relevant to the issue raised by the indictment, and concluded that it was not error to reject it. On the record before it, the Court perceived no error in the use by the government of H. G. Hooks as a witness for the prosecution.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it interprets Sec. 7206(1) of the Internal Revenue Code in a manner which precludes the accused from introducing evidence of the absence of a tax motive which is directly relevant to the issue of whether the accused "willfully" subscribed to a return not correct as to every material matter.

As was stated by the Court in *Silverstein v. U.S.*, 377 F.2d 269, 270 (1st Cir. 1967), "The real issue in prosecutions under the instant statute is defendant's state of mind in reporting his income." It would seem logical that an accused would not willfully subscribe to an incorrect return without a reason or motive. Therefore, it follows that the accused should be allowed to introduce evidence which negates a particular state of mind. However, the Petitioner has been denied the right to show that he did not have a tax savings motive.

In *Silverstein*, cited by the Court of Appeals for the Fifth Circuit, the defendant attempted to establish that his tax liability was only a small or insubstantial amount. He was not allowed to submit such evidence. However, *Silverstein* is not in point and should be distinguished from the Petitioner's case because in *Silverstein* there was a tax liability, although small, which indicated some unreported income. The size of the tax liability would not tend to prove that the accused had no tax motive, but rather, would only shed light on the degree of such existing tax motive. In the instant case, if the activity alleged to be criminal would not produce a tax liability because of the inherent characteristics of the activity, this fact bears on the issue of the Petitioner's "willfulness" in submitting an allegedly incorrect return.

The two other cases cited by the Court of Appeals, *Sirabo v. U.S.*, 377 F.2d 469 (1st Cir. 1967), and *Hoover v. United States*, 358 F.2d 87 (5th Cir.), *cert. denied*, 385 U.S. 822 (1966), do not deal precisely with the accused's material misrepresentation.

Petitioner offered testimony from three Certified Public Accountants to the effect that:

1. Each had listened to the testimony of the accountant, Solomon Bossin, concerning the accounting methods used by the House of Tobacco during the years in question (R. 664).

2. Each had heard the testimony of Dave Silberman, an employee of the House of Tobacco, concerning the alleged cash cigarette purchases allegedly made at the direction of the Petitioner (R. 664).

3. Each was of the opinion that the accounting system utilized by the House of Tobacco would correctly reflect taxable income (R. 664).

4. Each was of the further opinion that the cash purchases of cigarettes in the manner described would not affect or distort taxable income for the years in question in light of the overall accounting method used by the House of Tobacco (R. 664).

At the initial attempt of proof by Petitioner, the Government objected contending, "Whether or not the tax was paid is not an element of this offense, and it is irrelevant, so we move to strike" (R. 377).

The Court not only sustained the objection, but at the same time, Petitioner contends, erroneously instructed the Jury, "Not to consider *for any purpose*, whatsoever, whether or not the tax was paid," (R. 377) (Emphasis supplied).

Counsel for Petitioner immediately stated to the Court, "I think it is in this case, although it [Tax Deficiency] is not an element. It goes to the question of intent. And although the Government is not required to prove that there is no deficiency, we are entitled to prove that all the taxes were paid, so that there is no reason for misrepresentation. There has to be specific intent" (R. 378).

The Court again sustained the objection (R. 378).

It is the contention of the Government that because neither tax deficiency nor tax avoidance motive is an element in a Sec. 7206 prosecution, evidence of the absence of a tax deficiency or tax avoidance motive is irrelevant and inadmissible.

The Petitioner on the other hand contends that evidence from which the jury might conclude that Petitioner's acts would not create a tax deficiency might lead them to conclude that tax savings was not the reason Petitioner did the things charged by the Government to have been

done. Absent proof by the Government of another reason for the alleged misstatement of sales, or absent proof that the Defendant was not aware that his acts would not produce a deficiency, the jury might conclude that the alleged misstatements, if they occurred, were unintentional.

Petitioner does not contend that deficiency in tax is an element that must be pled and proved by the Government for successful prosecution. *U. S. v. Rayor,* 204 F. Supp. 486 (D.C. Cal. 1962), *cert. denied,* 375 U.S. 993 (1964). Nor does the Defendant contend that the Government's prosecution was incomplete because it failed to prove that the Petitioner harbored a tax savings motive, or upon failure to prove the tax savings motive, failed to prove another specifically identifiable motive. However, Petitioner does contend that even though a tax deficiency is not an element of a Sec. 7206 prosecution, the absence of a tax deficiency is a fact which should be admissible for the jury's consideration of the accused's "willfulness".

Whether in proving willfulness the Government, as a legal requirement, must offer evidence of a specific motive is to be determined from the various interpretations of *U.S. v. Murdock,* 290 U.S. 389 (1933); *Spies v. U.S.,* 317 U.S. 492 (1943); and, *Holland v. U.S.,* 348 U.S. 121 (1954); but such interpretation is not determinative of the issue herein. Even if an interpretation is given to the cited cases that does not require the Government to allege and prove a specific reason for the alleged conduct to show willfulness, as a practical matter if the Government does not establish that Petitioner was motivated by tax savings or the tax consequences of submitting the Federal Income Tax Return, the jury would probably require the Government to offer evidence of some other equally compelling motive prior to conviction. Such would

be even more probable if the accused proves the absence of the tax savings motive.

Such requirement would be only fair since it would be unwarranted for the jury to assume that Petitioner would intentionally misrepresent a material fact without a substantial reason. Moreover, it would be putting the cart before the horse for the jury to assume that because Petitioner misrepresented the sales figure, he had a reason or a motive.

Petitioner submits that a criminal prosecution under the Internal Revenue Code in and of itself, suggests to the jury that the possible motive for the alleged misstatement was tax savings, either by avoidance or evasion. It is obvious that the Government's attorneys did their best to suggest to the jury that a substantial amount of the so called "millions of dollars" used to purchase cigarettes escaped the tax collector's toll.

The error specifically complained of is the refusal of the Court to allow the Petitioner to offer evidence tending to contradict or disprove the suggested motive.

Petitioner recognizes that guilt could probably be established even if the misstatement was made with motives other than tax savings or avoidance primarily in mind. *Elwert v. U. S.*, 231 F.2d 928, 933 (9th Cir. 1956). Consequently, if the jury believed that Petitioner misstated certain items on his tax return to mislead his ex-wife, for example, evidence tending to establish such a reason would be sufficient to support a jury finding of the requisite willfulness. But, if in the hypothetical case the taxpayer convinced the jury of the absence of a tax motive, unless the government put on proof of the undisclosed reason involving the ex-wife as a practical matter the jury might possibly acquit.

To reiterate, the issue is not whether a deficiency or tax motive is necessary to conviction under Sec. 7206, but rather whether and to what extent the probable absence of a deficiency or tax motive bears on the issue of willfulness where no other motive is proved.

Petitioner recognizes that Sec. 7201 of the Internal Revenue Code of 1954 is a statute separate and apart from Sec. 7206, and the elements of each are different as are the degrees of proof sometimes necessary to establish each element. However, Sec. 7206 is a little used statute and the cases arising thereunder are scarce. The cases construing the size of a deficiency insofar as its effect on willfulness in a 7201 prosecution, however, are somewhat parallel and can possibly be helpful in portraying Petitioner's contentions. Pursuant to Sec. 7201, although a deficiency has been established by evidence submitted by the Government, evidence of the size of the deficiency is relevant bearing solely on the issue of willfulness. If the deficiency is large either in dollars or in relation to reported net income, that factor will, as a practical matter, weigh heavily against the Defendant on the issue of willfulness. *Cenedella v. U.S.*, 224 F.2d 778 (1st Cir.), *cert. denied*, 350 U.S. 901 (1955); *Barshop v. U.S.*, 192 F.2d 699, 703 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952); *Schuerman v. U.S.*, 174 F.2d 397 (8th Cir. 1949).

Contrariwise, the smallness of the deficiency weighs in favor of a Defendant. *U.S. v. Jannunzio*, 184 F.Supp. 460 (D.C. Del. 1960).

It is submitted that in similar fashion the absence of a deficiency would be relevant to the question of intention even in a 7201 case except for the fact that absence of a deficiency does, in all respects, acquit under Sec. 7201.

What the Petitioner was attempting to prove by the accountants in the instant case, was that the alleged acts of the Petitioner in diverting the funds from the bank to the purchase of the cigarettes would not have affected taxable income or produced a tax savings,[2] and thus, in all probability, not calculated to produce a tax savings.

It is assumed that the Government will argue that the offer of evidence was incomplete or premature in that the Defendant himself had not testified and was the only one who could actually testify as to what he intended. Additionally, the Government will presumably argue that since there was no proof that Defendant actually knew or believed that his actions might not produce the tax savings, the evidence of the inability to achieve the tax savings would be premature.

In view of the action of the Supreme Court in *James v. U. S.*, 366 U.S. 213 (1961), however, Petitioner submits that evidence of the improbability that tax savings would result from the alleged conduct is relevant in determining whether tax savings was the motive, and whether the conduct was willful, whether or not there had been any proof that the Petitioner actually knew, or had reason to believe, that his conduct would probably not result in a tax savings.

In interning *Wilcox v. U. S.*, 327 U.S. 404 (1946), and holding that on the basis of its later decision in

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2. The evidence offered by Petitioner herein concerned a circumstance of which the Petitioner could have been aware at the time the alleged illegal acts took place. This evidence is to be distinguished from those offers of evidence (such as earlier carry back credits) which, though erasing earlier tax liabilities could not have affected the intent to save taxes when the erroneous return was filed and which evidence would not be relevant even on the issue of willfulness. See *Willingham v. U. S.*, 289 F.2d 283 (5th Cir.), *cert. denied*, 368 U.S. 828 (1961); *Goo v. U. S.*, 187 F.2d 62 (9th Cir. 1951).

Rutkin v. U. S., 343 U.S. 130 (1952), James, who embezzled funds from his union, not reporting same as income, could be found guilty of Income Tax evasion as a matter of law, the Court dismissed the indictment on the grounds that there was the possibility at the time the embezzlement took place that James *could have* assumed that *Wilcox* was still the law in spite of *Rutkin*, and consequently, "willfulness" could not as a matter of law be proved.

By depriving the Petitioner of the opportunity to introduce the offered evidence, the Court prevented the Petitioner from contradicting willfulness by circumstantial evidence and in effect erroneously suggested to the jury that "willfulness" could be presumed solely from the act of the Petitioner wherein he allegedly misstated the gross sales figures, which suggestion is contrary to law.

2. The second reason that the decision below should be reviewed is that when in response to questioning by the United States Attorney, the witness Hooks testified contrary to that which the government knew to be true, and similarly falsely testified on cross-examination, and the U. S. Attorney did nothing to correct or qualify the false testimony, the Petitioner was denied a fair trial.[3]

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3. The Fifth Circuit, on the basis of the record before it, perceived no error in the use of the testimony of H. G. Hooks. The language of the Court of Appeals indicates that the Court was not convinced that the government knew that the testimony was false. It should be noted that the Petitioner was not granted a hearing on his motion for a new trial (R. 617). Therefore, if the Court of Appeals was simply not convinced that the government knew the testimony to be false, the case should at least be remanded for a hearing on this point. If there was any doubt, the Court should have taken evidence on this question in a new trial.

The theory of the Government was that:

1. The accounting system used by the House of Tobacco picked up as sales only merchandise checks deposited in the bank account of the Corporation (R. 62; 65).

2. Checks issued by customers for merchandise and not deposited in the bank account would cause an understatement of sales equal to the dollar amount of checks not so deposited (R. 63-64; 473).[4]

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4. Appellant contends this is not necessarily so and the Government did not go far enough in its investigation to ascertain whether the non-deposited merchandise checks constituted omitted sales. The accountant Bossin on cross examination admitted that just because a check received for merchandise was not deposited in the bank, it did not necessarily follow that that particular sale went unreported (R. 351-352). If the check was cashed and that cash was deposited in lieu of the check, the sale would be reported just as if the check itself had been deposited. Similarly, if the cash received for the check was used to cash a non-purchase check and the non-purchase check was deposited in the bank account, the sale would be recorded. The witness Silberman testified that his standard practice was to cash the larger checks that he had received from customers for merchandise, rather than to deposit the large merchandise checks to the account and to deposit in lieu of the merchandise checks, the non-customer checks (R. 275-276). He testified that he did this on his own and for convenience (R. 276). The key to whether or not the checks offered in evidence by the Government represented omitted sales was whether or not there was a similar amount of non-purchase checks deposited in the corporation's bank account. The Government relied on circumstantial proof that certain sales were not on the Federal Income Tax returns. The cogency of this proof depends upon the effective negation of any reasonable explanation which would relieve Defendant from liability. The years involved were 1958 and 1959. When the Government began its investigation, the checks from non-customers were, in all probability, available either from the bank or from persons who had, in fact, written the checks. The identity of the person cashing the checks was no secret to the Government, and the files of the Government are replete with comment on the involvement of many of these people in the Government's case. During the years 1958 and 1959, and prior to prosecution, the Defendant had no reason to

3. Appellant caused certain merchandise checks to not be deposited and attempted to conceal this failure in various ways, one of which was by not giving a customer evidence of the sale (R. 62-65; 476; 512-513).[5]

The answer of the defense to the concealment theory of the Government was that had the Appellant intended concealment he would have given no evidence at all of any sale; yet each and every customer of the House of Tobacco received a receipt of sale of some sort, be it printed invoice or scratch paper (R. 71).

Rather than attempt to rely on the irregular receipts to persuade the jury of an "attempt to mislead" theory in lieu of the "concealment" theory, the government proceeded with its attempt to prove that at least one person had not received an invoice or a receipt or a piece of paper of any kind and this is the point in the trial where the government struck a foul blow.

Every witness, save one, that had been asked whether a receipt or invoice had been given had indicated that one or the other had been received. The only witness who testified otherwise was Hubert Jack Hooks, Jr. (R. 290-298).

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anticipate the necessity for these checks, no reason to obtain them from the banks, and had no way at trial to meet this requirement of proof. The United States, as a part of its case, should have traced down this lead which was obvious to it from the very beginning of its investigation, and a lead that was reasonably susceptible of being verified at the beginning (*Holland v. U. S.*, supra). The United States, as a result, has succeeded in obtaining a conviction upon a theory of circumstantial evidence which does not necessarily prove anything, but which, at this time, cannot necessarily be disproved.

5. The uncontroverted facts were that not all customers received invoices imprinted with the name of the House of Tobacco. Many received receipts on scratch paper such as old invoices from other ventures, or plain pieces of note paper, as well as various and sundry other types of paper.

The U. S. Attorney first asked the witness Hooks whether, "there came a time when you got some cigarettes from the House of Tobacco and didn't get the [regular] invoice?"

The witness Hooks answered that there was and was then specifically asked by the U. S. Attorney, "Did you get a little piece of paper or something?"

The witness answered that he did not.[6]

Because the United States Attorney sought to elicit the testimony, there can be little doubt that the government believed it to be important to its case. [*Napue v. People of the State of Illinois*, 360 U.S. 264 (1959)]. Moreover the government capitalized on the false testimony of the witness Hooks in closing argument where the Assistant United States Attorney argued,

> "Another little thing I think shows intent and knowledge and willfulness, talking about these side sales; Mr. Hooks came in; he didn't even get an invoice, not an invoice."[7]

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6. This is one of the statements alleged to have been false. The truth is that Hooks had purchased cigarettes from the House of Tobacco under an assumed name, i.e., "Lewis." The government knew this because they had found retained invoices in the Record Boxes of the House of Tobacco in the name of "Lewis" that corresponded with the check and purchase records that they had gathered in their investigation of the witness Hooks (R. 626-642).

7. Appellant concedes that the Assistant U. S. Attorney may have been referring only to the absence of invoice imprinted with the name of the House of Tobacco. However, such seems unlikely in view of the fact that many of the witnesses did not receive printed invoices, but rather various receipts, yet Hooks was the only such witness singled out by the Assistant United States Attorney in his argument. To those jurors remembering the testimony of Hooks, the point was clearly made that there was at least one person who received no receipt at all, and that was Mr. Hooks.

The government has never categorically denied that it knew Hooks had actually purchased cigarettes from the House of Tobacco receiving in lieu of the regular printed invoices in his name, receipts to one "Lewis," and that Hooks' testimony was false. Rather the government points out that the "evidence against Hooks is circumstantial in nature and not subject to absolute proof or verification" (R. 650).

Appellant submits that in view of what the government did know, circumstantial or not, such an answer is no excuse for the unqualified use of the testimony of the witness Hooks.

What did the government know? It knew that Agent Henley questioned Mr. Hooks at his home on May 11, 1961, and had asked him whether he had purchased all of his cigarettes from the House of Tobacco during 1958 and 1959, and whether he always received a pre-numbered invoice and never any other type of receipt (R. 632). To which questions Hooks answered that all purchases by him were from the House of Tobacco and he had received only pre-numbered printed invoices and never any kind of receipt (R. 633).

In contrast to Hooks' statement, the government knew from an examination of the payment records of the House of Tobacco that Hooks had made payments to the House of Tobacco for purchases not listed on printed invoices from the House of Tobacco to Hooks (R. 634).

Moreover, it knew that Agent Henley had found among the records of the House of Tobacco retained receipts indicating sales to a person by the name of "Lewis" (R. 441, 637, 642).[8]

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8. The receipts were written on old discarded D. S. Tobacco Co. invoices which the government knew was not unusual insofar as the

It also knew that by analyzing the payments made by check by the witness Hooks to the House of Tobacco and the purchase records of the House of Tobacco, a correlation "to the penny" could be made between the non-invoice receipts to one "Lewis" and the purchases of Hooks (R. 637-642).

As a result of the cumulative knowledge set out above, it knew that Hooks had lied when he stated that he received only printed invoices from the House of Tobacco and more important, from the evidence that it presented in the previous trial, it knew that Hooks, like the other witnesses, received the scrap paper receipts when it purchased the so-called side sales (R. 637-642).[9]

The government may argue that since all of the sales to Hooks by the House of Tobacco were not accounted for by invoices or receipts subsequently found, there may have been sales to Hooks without any written evidence at all. The government may additionally argue that since the government's attorneys could not be 100% certain that Hooks, even though he had lied previously, was again lying, there was no reason for the government not to allow Hooks to tell his story any way he wanted to, placing the burden on the defense to prove otherwise, if it could.

House of Tobacco was concerned. Although written on D & S Tobacco Co. invoices, the records were offered by the government as records of the House of Tobacco since they were found among the retained records of the corporation. That plus the circumstances under which they were found and the corroborating computations, the government contended, satisfied the authentication requirements for admission in evidence.

9. Hooks was indicted along with six other defendants and Appellant with conspiracy to defraud the Internal Revenue Service. (Violation 18 USC 371) (R. 2). The first trial of these defendants ended in a hung jury and mistrial (R. 650). The conspiracy charge was severed prior to the second trial and dismissed against all the defendants (R. 10).

In theory, this might sound fair and consistent with the adversary system; but the subsequent false testimony by the witness Hooks demonstrated why any false testimony by a Government witness known to be false by the Government, if allowed to stand uncontroverted by the Government, prevents a fair trial.

The defense attempted to prove that Hooks did in fact receive receipts from the House of Tobacco, but received them under an assumed name. When specifically asked this question by defense counsel, Hooks categorically denied that he had ever operated under an assumed or purchased cigarettes receiving receipts under an assumed name (R. 295-296).[10]

At this point, the government's attorneys well knew that Hooks had lied about using an assumed name and were well aware that his reason for lying was to protect his earlier statement that he never received receipts in lieu of printed invoices. They also well knew that the defense was at an extreme disadvantage in that to contradict the testimony, the defense would have to call either Agent Henley (at worse a dangerous witness insofar as the defense was concerned, or, at best, an unwilling and interested witness) or Mr. Rush (who because of his relationship with the defendant probably would not have been effective) or the Defendant himself (whose testimony probably would have been ineffective because of his obvious interest in the outcome of the litigation).

Seeing the difficulty in which the government's witness, by his lies, had placed the defendant, it was incumbent upon the representative of the United States to set the record straight. *Napue v. People of the State of Illinois, supra; Brady v. Maryland*, 373 U.S. 83 (1963).

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10. This was the second false statement.

Not only did the United States Attorneys not do this, they compounded the defense difficulties by attempting to hinder the defense efforts to find a way to disprove the false testimony.

When defense counsel requested the witness to remain after his testimony subject to recall for cross examination, the United States Attorney indicated to the Court that he "has no further use for the witness" and asked the court to require the defendant to either cross examine the witness then and there, (which defense counsel was obviously not prepared to do because of surprise) or if more examination was necessary by the defense, require that the defense make the witness a defense witness.

At that point it was plain to the defense that the United States representative fully intended to allow the testimony to stand uncontradicted and unqualified placing upon the defense the burden of overcoming the evidence. It was also readily apparent that the representative of the United States intended to take full advantage of all of the testimony of the witness Hooks, whether that testimony be true or false.

This Appellant contends was unfair conduct on the part of the representative of the United States and it was this unfair conduct that denied Appellant a fair trial. *Napue v. People of the State of Illinois, supra; Mooney v. Holohan,* 294 U.S. 103 (1935); *Pyle v. State of Kansas,* 317 U.S. 213 (1942); *Barbee v. Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1964).

Moreover, no substantial difference whether both or only the latter statement[11] of the witness Hooks referred

11. This statement was made while the witness was being cross examined.

to were known by the United States representative to have been false since the unfairness is there even though the false answer was not solicited by the Government if the Government allows the false answer to go into the record when it appears. *Alcorta v. State of Texas,* 355 U.S. 28 (1957). See generally annotation 2 L.Ed.2d 1575.

It is no answer for the government to say that the Defendant by his own testimony or in any other way could have neutralized the false testimony, because it is unfair for the Government to use false testimony from one of its witnesses for any purpose whatsoever, whether that purpose is to directly influence the jury by the evidence itself or to force the defendant to put on the witness stand a government agent who may or may not be hostile to the defense, or for any other reason. If the evidence is in any way relevant to the case, the United States Attorney who represents the people, including the accused, have the responsibility and the duty to correct what they know to be false and misleading testimony from one of their witnesses, and to elicit the truth prior to allowing that witness to be discharged. *Napue v. People of the State of Illinois, supra.* No matter what the motives of the government's attorneys were, when they allowed the testimony of the witness Hooks to go into the record uncontradicted and unqualified, they denied Appellant a fair trial and denied Appellant due process of law.[12]

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12. The error specified is the failure of the Court to grant Appellant's Motion for New Trial which in paragraph I pointed out the conduct complained of.

CONCLUSION

For the reasons given, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ORIGINAL SIGNED BY
EDWIN M. SIGEL

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SIGEL AND SIMMS
311 Oil and Gas Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition for Certiorari has been made on opposing counsel by mailing five copies thereof on this 12 day of Aug., 1968, in an envelope, with postage prepaid, properly addressed to them as follows:

Morton Susman
United States Attorney
U. S. Court House
Houston, Texas 77002

ORIGINAL SIGNED BY
EDWIN M. SIGEL

Edwin M. Sigel

CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition for Certiorari has been made on opposing counsel by mailing five copies thereof on this 16 day of August, 1968, in an envelope, with postage prepaid, properly addressed to them as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

ORIGINAL SIGNED BY
EDWIN M. SIGEL

Edwin M. Sigel

CERTIFICATE OF SERVICE

It is hereby certified that service of the Appendix has been made on opposing counsel by mailing five copies each thereof on this 16 day of August, 1968, in an envelope, with postage prepaid, properly addressed to them as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Morton Susman
U. S. Attorney
U. S. Court House
Houston, Texas 77002

ORIGINAL SIGNED BY
EDWIN M. SIGEL

Edwin M. Sigel

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24,831

MAIR J. SCHEPPS, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

(June 7, 1968.)

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge.

PER CURIAM: The appellant has been found guilty, in two counts, of violating 26 U.S.C., §7206(1), wilfully making and subscribing a federal income tax return which he did not believe to be true and correct as to every

material matter. That the return was false in certain particulars is not disputed. Although not charged with nor being tried for income tax evasion, appellant says that he should have been allowed to introduce proof showing that the falsity resulted in no tax deficiency. This proof was not relevant to the issue raised by the indictment and it was not error to reject it, *Siravo v. United States*, 1 Cir., 1967, 377 F.2d 469; *Silverstein v. United States*, 1 Cir., 1967, 377 F.2d 269; *Hoover v. United States*, 5 Cir., 1966, 358 F.2d 87, 89, *cert. denied* 385 U.S. 822.

On the record now before us we perceive no error in the use by the government of H. G. Hooks as a witness for the prosecution.

AFFIRMED.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24,831

D. C. Docket No. Cr. 65-H-3

MAIR J. SCHEPPS, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN and GODBOLD, Circuit Judges and RUBIN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate:

June 7, 1968

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24,831

MAIR J. SCHEPPS, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

[July 15, 1968]

ON PETITION FOR REHEARING

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge.

PER CURIAM:

The Petition for Rehearing in this case is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 404

MAIR J. SCHEPPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was found guilty on two counts of an indictment which alleged violations of 26 U.S.C. 7206(1) in that he had wilfully made and subscribed corporate income tax returns for the House of Tobacco for the fiscal years ended August 31, 1958, and August 31, 1959, verified by written declarations that they were made under the penalties of perjury, which returns he did not believe to be true and correct as to every material matter in that the gross sales were understated by approximately one million dollars in each

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year (R. 340–342, 405, 528–529).[1] He was sentenced to one year's imprisonment on Count 4 and three year's probation on Count 5; he was also fined a total of $5,000 (R. 662–663).

House of Tobacco, a distributor dealing primarily in cigarettes and to a much lesser extent in cigars, gum and candy, sold to jobbers and wholesalers (R. 327). In broad outline, the government's proof showed that receipts from corporate sales which were not deposited in the bank were not reported on the federal income tax returns (R. 340, 415) and that the gross receipts undeposited and unreported totalled about $1,000,000 in each of the two years (R. 274, 340–342, 405).

The great bulk of the corporation's sales were of cigarettes fully tax-paid and acquired through a bonded warehouse (R. 282, 286, 288). Sometime prior to 1958, upon authorization by petitioner (R. 81–86, 181–187, 290–294, 277), the corporation began making "side sales" of cigarettes at a special discount to certain customers (R. 224–238). These sales were not recorded on the pre-printed corporate invoices but were recorded irregularly, sometimes on invoices of other companies or on scratch paper having no company name printed thereon (R. 225–226); some sales were without any written memorandum whatever, other than a notation in the margin of the invoice book of the total amount sold, which notation was later scratched out when payment was received (R. 227,

[1] Three other counts, charging petitioner and others with conspiracy and tax evasion, were dismissed on the prosecution's motion near the close of the evidence (R. 382).

402). No permanent record of these "scratch-out" sales was kept (R. 254–255, 280–281). Large amounts of cigarettes were purchased by the corporation from sources other than the bonded warehouse during the period in question and paid for in currency instead of by bank check (R. 245–251, 271). It became the corporation's custom to cash large amounts of checks each week and to retain the proceeds in currency in a cigar box kept on corporate premises for the purchase of cigarettes from the source other than the bonded warehouse (R. 191–195, 245–247, 298–320). Between $8,000 and $20,000 per week of corporate receipts were reduced to currency which was kept on the premises, mostly in the form of $100 bills (R. 246–249).

The corporation's accounting system required that all income be deposited to the bank account (R. 332, 337–338, 345). The accountant who prepared the returns did not perform an audit, but arrived at gross sales by eliminating from the total bank deposits all non-income items (R. 325, 332–335, 345–346). He had discussed this system with petitioner and Jack Rush, petitioner's associate in the business (R. 337, 344–345).

1. The district court did not, as petitioner urges (Pet. 5–12), err in excluding evidence that petitioner offered to prove there was no tax deficiency. This evidence was irrelevant and immaterial to any issue in the case. As the jury was instructed (R. 465, 468–469), there are three elements to a violation of Section 7206(1). These are (1) that the defendant made and subscribed the tax returns under the written

declaration that they were made under the penalties of perjury; (2) that when he signed the returns he did not believe them to be true as to every material matter; and (3) wilfulness. A tax deficiency, however, is not an element of the offense. *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1); *Hoover* v. *United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822; cf. *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917. To admit evidence such as that proferred here therefore would have allowed petitioner to defend against a crime with which he was not charged[2] (tax evasion, 26 U.S.C. 7201). And even if that evidence is thought to have some bearing on the question of wilfulness, it is at best remote, and would be likely to confuse the jury—a denouement that the trial court could properly prevent by excluding the evidence.

Petitioner cites no contrary authority, and we are aware of none. Indeed, a contention almost identical to that made here was recently rejected by the First Circuit in *Silverstein* v. *United States*, 377 F. 2d 269, 270–271. As the court there said: "the fact that the calculated tax may have been thought insubstantial, casts no light on the question whether the defendant innocently overlooked his gross receipts."

Lastly, the prosecutor made clear in his summation that petitioner was not being charged with at-

[2] The government had evidence of understatements of net income and tax liability, for petitioner had been indicted for wilfully attempting to evade corporate taxes (Pet. 3, fn. 1; R. 2, 526–528). This charge, as petitioner points out (Pet. 3, fn. 1), was dismissed by the government during the trial. See footnote 1, *supra*.

tempting to evade tax (R. 471). Defense counsel urged repeatedly that the gross receipts that were not reported were used for business purposes (R. 480–481, 482, 487) and that the government had not shown any motive for falsification of the returns (R. 492, 495, 499). There could not possibly have been any prejudice.

2. There is no substance to the argument (Pet. 12–20) that one witness—Hooks—at two points gave tesimony that the government knew to be false. The first piece of testimony under attack is Hooks' statement (R. 293–294) on direct examination that he had made some purchases from the corporation for which he received no invoices of any kind. The only indication that Hooks was lying was that in 1961 he had told Agent Henley (who investigated the instant case) that in his dealings with the corporation he had "always received a pre-numbered invoice" (R. 633). But even petitioner agrees that this 1961 statement was incorrect (Pet. 16–17); hence, even if the prosecutor had recalled it, he would have had no reason to believe that Hooks was lying on the witness stand and every reason to believe that Hooks was then telling the truth.[3] For example, Henley expressed the opinion in a 1967 affidavit (R. 661) "that Hooks received side

[3] Petitioner claims (Pet. 17) that the government knew, from the evidence in a previous trial, which ended in a hung jury, "that Hooks, like the other witnesses, received the scrap paper receipts when it purchased the so-called side sales (R. 637–642)." This is incorrect. The pages of the record referred to relate only to two invoices issued in the name of Lewis which may have represented sales to Hooks. (See text, *infra*.) Even if they did, there is no inconsistency between that fact and Hooks' testimony that he sometimes did not get invoices.

sales from the House of Tobacco without an invoice because Hooks received side sales over a period of time for which no record has been found either in his possession or in possession of the House of Tobacco."

The other part of Hooks testimony claimed to be false is his statement on cross-examination (R. 296) that he had never bought merchandise under an assumed name. Agent Henley had testified at a previous trial that an analysis of certain invoices had led him to the conclusion that two invoices in the name of Lewis had in fact been issued to Hooks (R. 626–629, 633–642). But those invoices were not conclusive. Hooks never told Henley that he had transacted business under the name of Lewis or any other assumed name (R. 661). The defense was fully aware of Henley's earlier testimony yet did not even mention the name of Lewis in cross-examining Hooks. Notably the defense did not call Agent Henley or petitioner's business associate, Rush, to impeach Hooks, even though both were present in the courtroom (R. 654) and Rush filed a post-trial affidavit stating that Hooks sometimes bought merchandise in the name of Lewis (R. 629–630).[4]

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[4] Rush's affidavit stated that on these occasions the invoices were made out to Lewis at the request of Hooks; that he (Rush) did not know whether Lewis really existed; but that Hooks was either "acting for Lewis or under the assumed name of Lewis." (R. 630). Rush's information was unavailable to the Government until after the trial.

The allegation (Pet. 17) that the government knew that a correlation could be made between "the non-invoice receipts to one 'Lewis' and the purchases of Hooks (R. 637–642)" is true only with respect to two invoices over the two-year period. Since Hooks was making about four purchases each week from

The theory that Hooks' testimony was false is dubious. The theory that the prosecutor knew it was false is wholly without support. The defense—no less than the prosecution—had full knowledge of and access to whatever evidence arguably impeached Hooks. At most there was available to the defense a contention that Hooks was lying—an issue of credibility of the sort that should have been submitted to the jury. The defense nevertheless did not raise the question until after trial. No precedent supports petitioner's present thesis—which amounts to a contention that the appellate courts should consider and decide whether Hooks was a credible witness.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MITCHELL ROGOVIN,
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JOSEPH M. HOWARD,
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Attorneys.

SEPTEMBER 1968.

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the corporation the correlation of two Lewis invoices means little. Even if the Lewis invoices were issued to Hooks, the fact may be—as even Rush's affidavit (R. 630) admits—that Hooks was merely acting for a man named Lewis.

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